

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 18-0690  
 )  
 LARRY GROSS, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
HONORABLE SCOTT ROSENBERG, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT

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FINAL

## **CERTIFICATE OF SERVICE**

On the 19th day of December, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Larry Gross, No. 0207647, Mt. Pleasant Correctional Facility, 1200 East Washington St., Mt. Pleasant, IA 52641.

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **WHETHER THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY?**

#### **Authorities**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997)

State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)

State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004)

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Iowa Code § 910.1(4) (2017)

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State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997)

State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987)

State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999)

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal of an order of restitution in Polk County case number FECR307016.

**Course of Proceedings:** On August 9, 2017, the defendant, Larry Gross, was charged with arson in the first degree in violation of Iowa Code sections 712.1, 712.2 (2017), a class B felony. (Trial Information) (App. pp. 4-5). On October 19, 2017, Gross entered a guilty plea to the lesser included charge of arson in the second degree in violation of Iowa Code sections 712.1, 712.3 (2017), a class C felony. (Plea Hrg. tr. p. 1, L. 1-25, p. 14, L. 11-14). On January 5, 2018, the court sentenced Gross to 10 years in prison. (Sentencing Order) (App. pp. 9-12). Gross filed a notice of appeal on January 8, 2018. (Notice of Appeal) (App. p. 14). That appeal is still pending.

On April 6, 2018, the Polk County Sheriff filed an application for reimbursement for room and board pursuant to Iowa Code section 356.7 (2017) in the amount of \$11,415.00. (Sheriff's Application for Reimbursement) (App. pp. 15-16). On April 9, 2018, the district court approved that claim. (Order, 4/9/2018) (App. pp. 17-18). The defendant filed a notice of appeal from that order on April 18, 2018. (Notice of Appeal) (App. pp. 32-33).

**Facts:** According to the minutes of testimony, police officers were dispatched to a house in Des Moines on a report of a house fire. The house in question belonged to the defendant, Larry Gross. At the scene, police officers interviewed Geoff Hansen and Megan Gross, the defendant's wife, who both lived in the house. Hansen stated that Gross was agitated and upset that day. He had locked himself in his room, and eventually came out and told Hansen that if he had any personal belongings in the house, he should get them and leave because Gross had just set the house on fire. Hansen called 911. Megan Gross told officers she and Larry had argued about \$50 that was

missing from their room. She also told officers that Larry had locked himself in the room and later came out stating that he had set it on fire. Officers found some damage to the bedroom wall and door. Larry was arrested and charged with arson in the first degree. (Trial Information and Minutes of Testimony) (App. p. 4-5) (Conf. App. pp. 4-12).

Further relevant facts will be discussed below.

### **ARGUMENT**

#### **THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY.**

**Preservation of Error and Standard of Review:** The defendant did not have the opportunity to object to the order of restitution as the order was issued without notice or opportunity to be heard. The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The sentence in the instant matter is illegal by virtue of the fact that Gross was ordered to pay room and board

without any showing that he had the reasonable ability to repay those obligations. (Order, 4/9/2018) (App. pp. 17-18).

No objection is necessary to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant needs no object to sentencing irregularity to preserve issue for appeal). Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

The Court reviews a district court's restitution order for errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004). When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766

N.W.2d 606, 612 (Iowa 2009).

**Discussion:** During the sentencing hearing, the court ordered restitution, and the prosecutor stated that there was no restitution at that time and did not know what the restitution would be. The court found that the defendant was not able to pay his attorney's fees. The court also suspended the fine. (Sentencing Hrg. tr. p. 10, L. 18 – p. 11, L. 8). Three months later, the Polk County Sheriff filed a request for reimbursement for room and board in the amount of \$11,415. (Sheriff's Application for Reimbursement) (App. pp. 15-16). Three days later, the court approved the application without a hearing and without making a finding regarding the defendant's ability to pay. (Order, 4/9/2018) (App. pp. 17-18). The order informs the defendant that if he disputes the amount owed, he should contact the Polk County Jail. Further, it states that the defendant may file an application for the court to re-examine the decision by filing an application within 15 days of the filing of the order. (Order, 4/9/2018) (App. pp. 17-18). The order was sent to a residence in Des Moines despite the fact that the

court had, three months earlier, sent the defendant to prison for up to 10 years. No appeal bond had been posted. The defendant did not request a hearing, but did file a timely notice of appeal.<sup>1</sup> The clerk of court filed a docket report on April 18, 2018, which includes the amount owed for reimbursement for room and board as \$11,415. (Combined General Docket Rpt., Financial Summary) (App. p. 30).

The district court is required to order restitution in all criminal cases where there is a guilty plea or a verdict of guilt. Iowa Code § 910.2(1) (2017). Restitution is defined as “payment of pecuniary damages to a victim in an amount and in the manner provided by the offender’s plan of restitution.” Id. § 910.1(4). In general, “restitution ordered to the victim is made without regard to the defendant’s ability to pay.” State v. Wagner, 484 N.W.2d 212, 215-216 (Iowa Ct. App. 1992).

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<sup>1</sup> “ ‘A defendant can and probably should ordinarily’ file a petition with the sentencing court pursuant to section 910.7 before appealing a restitution order, ‘but the defendant is not required to do so.’” State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001) (quoting State v. Janz, 358 N.W.2d 547, 548 (Iowa 1984)). That code section is permissive and not mandatory and “a defendant may appeal an illegal sentence without first filing a motion with the district court.” Id.

“However, restitution is ordered for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, for court-appointed attorney fees, for contribution to local anticrime organization, and for the medical assistance program only to the extent the defendant is reasonably able to pay.” Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016) (citing Iowa Code § 910.2(1) (2015)).

“Constitutionally, a court must determine a criminal defendant’s ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.” Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000).

In this case the court did not consider the defendant’s ability to pay the room and board as is required by the statute. The court did determine that the defendant did not have the ability to pay his attorney fees at the January 5, 2018, sentencing hearing. (Sentencing Hrg. tr. p. 11, L. 4-8). The defendant had been continually incarcerated between that time and the order requiring him to pay \$11,415 for room and board.

There is no reason to believe he had the ability to pay that amount when he did not have the ability to pay attorney's fees.

Published Supreme Court case law is conflicting and this Court should clarify the proper procedure and scope of the "reasonable ability to pay" provision. In State v. Harrison, the Court stated that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees." 351 N.W.2d 526, 529 (Iowa 1984). "The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court costs and attorney fees without regard to the offender's ability to pay." Id. Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985), where the Court found the district court failed to exercise its discretion to determine whether Haines was reasonably able to pay all or part of his attorney fees.

In State v. Blank, the Court focused on not on the entire amount of restitution due, but on Blank's ability to pay the

current installment. 570 N.W.2d 924, 927 (Iowa 1997). The Blank Court cited State v. Van Hoff, but did not include the entire holding from the case. Id. The Court in Van Hoff held:

We do not believe Van Hoff's "reasonable" ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, although that might be one of the factors to be considered. A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due. Van Hoff does not claim that he is paying child support, alimony, or any similar expenses. His living expenses, obviously, are paid by the state. He does not claim that he is unable to pay twenty percent of his prison wages toward the restitution order.

State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987).

In State v. Swartz, the Supreme Court held that until Swartz exhausted the remedy provided in Iowa Code section 910.7 the Court had no basis for reviewing his "reasonable ability to pay" court costs and attorney fees. 601 N.W.2d 348, 354 (Iowa 1999). The Court in Jose concluded that Swartz had not challenged the total amount of criminal restitution (restitution plan), but the restitution plan of payment. State v.

Jose, 636 N.W.2d at 45. The Swartz opinion does not use the phrase “plan of payment.”

The law regarding the defendant’s reasonable ability to pay is conflicting and confusing. This Court should take this opportunity to clarify the law to aid the bench and bar. Must the court at sentencing or upon a supplemental restitution request determine a defendant’s reasonable ability to pay criminal restitution other than victim restitution for pecuniary damages? Gross respectfully submits the Harrison and Haines Courts were correct in its holding that in order to pass constitutional muster the reasonable ability to pay determination must be made when the amount of criminal restitution is determined at the time of sentencing or upon supplemental request and order. If this determination was not made, the defendant can challenge it on direct appeal and overrule this portion of Swartz. Additionally, the district court has the obligation to determine the total amount of criminal restitution the defendant has the reasonability to pay, not the

current installment as held in Blank.<sup>2</sup> If the installment amount is the determinative factor, the constitutionality of the restitution order will be undermined because the debt could last a life-time and reasonable ability to pay will be meaningless. To the extent Blank and Van Hoff hold otherwise, they should be overruled. It should not be incumbent upon the defendant to ask for a hearing to force the court to make a determination it is statutorily and constitutionally required to make in the first place.

### **CONCLUSION**

For the foregoing reasons the Appellant requests the Court reverse the restitution order and remand for a hearing on the defendant's reasonable ability to pay the entire amount of the room and board reimbursement.

### **NONORAL SUBMISSION**

Counsel requests not to be heard in oral argument.

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<sup>2</sup> In this case, there is no payment plan filed. The defendant has merely been ordered to pay the total amount.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 2.08, and that amount has been paid in full by the Office of the Appellate Defender.

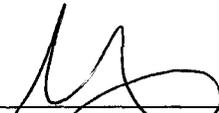
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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2,069 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

  
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